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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 379

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

—against—

MARGARET V. CHAMBERLAIN, as Administratrix of the Goods, Chattels and Credits of CHARLES FREDERICK CHAMBERLAIN, deceased,
Respondent.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

SOL GELB,
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(No. 37,076)

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BRIEF FOR RESPONDENT

Official Report of Opinions Delivered

The District Court delivered no opinion.

The opinion of the United States Circuit Court of Appeals is reported in 59 Fed., 2nd Series 96, and will be found in pages 188-192 of the record.

Statement of the Case

In this action, brought to recover damages for the death of a brakeman employed by the carrier, District Judge Anderson directed a verdict in favor of the Railroad Company. An appeal was taken by the respondent to the Circuit Court of Appeals, where, by a divided court, the judgment was reversed and the case sent back for a new trial.

Since Chamberlain was employed in interstate commerce at the time he met with his death, the action was one under the Federal Employers' Liability Act, 45 U. S. C. 51-59. To recover, it was necessary for the respondent to show negligence on the part of the carrier.

Decedent met his death while engaged in his work as a brakeman in the Morrisville, Pa. yard of the carrier. His work required him to ride cars down the "Hump" into various tracks in the yard, control their movement, and finally bring them to a stop. The cars would be cut off from the train at the top of the "Hump", and would be permitted to roll down into the yard by their own momentum. Chamberlain was a comparatively new man on the job, as he had been employed by the carrier for only a few weeks prior to the accident.

Just immediately preceding the accident, he was riding a cut of two cars down the "Hump", destined for track 14. His draft was followed by a draft of four cars for track 20, and a draft of nine cars destined for track 14, the

same track into which his draft was to go.

Chamberlain's body was found between the rails on track 14, about five or six car-lengths from the switch leading into the track.

It was the respondent's contention that Chamberlain was thrown off his draft by reason of a collision between the nine car draft and his own.

A witness (Bainbridge) testifying for the Administratrix, said that he was standing at the bottom of the "Hump", at a place marked "B" on the exhibit in evidence. He was waiting outside of the yard office for his conductor, so as to get further orders pertaining to his work. He was a member of a switching crew working in that yard. He saw Chamberlain's draft go down the "Hump" at about 8 or 10 miles an hour, with Chamberlain standing at the brake on the rear end of the second car.

He then saw another draft, which concededly was the one for track 20, and then saw the nine car draft which was to go into track 14, go down the "Hump". Both Chamberlain's and the nine car draft were comprised of gondola cars, and were loaded with gravel (R. 41). The significance of this fact lies in the position of the handbrakes and step where brakemen must stand to apply the brakes. Their bodies are not obscured by the superstructure of the cars.

After Bainbridge saw the drafts go by him, he paid no more attention to it for the moment

(R. 28). The next thing he saw was Chamberlain's draft moving on track 14, about two car-lengths from the switch leading into the track (R. 28). At that time, Chamberlain's draft was going very slowly, possibly three miles an hour (R. 28 and 29). Chamberlain was still on the car at the same brake where he was when Bainbridge first saw him (R. 29). At the same time he saw the nine car draft just going into track 14, about two car-lengths to the rear of Chamberlain's draft (R. 29). The nine car draft was going about 14 to 15 miles an hour (R. 29). Again he paid no more attention to it for the moment (R. 29).

He then stated that "possibly a couple of seconds" later he heard a loud crash (R. 30). He looked again and saw the cars drifting in on track 14 (R. 30). They were moving together in one band (R. 30, 31), and as they were moving down 14 in one band he estimated the speed of the band at about 7 to 8 miles an hour (R. 53). Chamberlain was no longer in sight (R. 30). Bainbridge did not know that an accident had occurred and paid no more attention to it (R. 31) until about two or three minutes later, when he heard some hollering from the vicinity of track 14, and he ran down there (R. 31, 52).

When he got there, he saw Chamberlain's body lying between the rails of track 14, about five or six car-lengths from the switch leading into it, and a few feet to the rear of the last car of the nine car draft (R. 32 and 53).

Contention of Parties

Upon this evidence, the administratrix based her contention that the carrier was guilty of negligence. Specifically she contended that Chamberlain was killed by reason of the nine car draft colliding with his draft and causing him to be run over by the nine car draft. The negligence was the operation of the nine car draft at an excessive and dangerous rate of speed.

The testimony showed that when cars are sent down on the various tracks, although they are supposed to couple up to whatever cars are already on the track, they are supposed to come together at a very slow rate of speed, and certainly at a speed no greater than two or three miles an hour (R. 76, 110).

The carrier's version as to the happening of the accident was in sharp conflict with the respondent's version. Its proof showed that the nine car draft did not come in contact with Chamberlain's draft but that Chamberlain's draft came in contact with the draft ahead of his. The nine car draft ran over Chamberlain's body, but after Chamberlain had already been on the ground and had apparently fallen from his own draft.

A witness for the carrier, one Jetter, who testified substantially to these facts, was accused by the administratrix and two other witnesses of having told them a story substantially to the same effect as Bainbridge's version of

the happening of the accident (R. 177-184). His credibility thus became an important issue in the case.

In reversing the judgment of the District Court, the Circuit Court of Appeals held that upon Bainbridge's testimony, a question of fact was made out over which reasonable men could fairly differ, and in such cases, the determination of the question belonged to the jury. The only question arising in the case therefore, is whether or not Bainbridge's testimony made out a case of negligence sufficient to permit a jury to pass upon it.

Argument

POINT I.

There was indeed sufficient evidence of negligence presenting a question of fact for the jury to pass upon.

The carrier's argument is based chiefly on the assertion that there is no proof in the record from which it may fairly be inferred that the nine car draft collided with Chamberlain's draft, causing his death. To support this argument, it is necessarily compelled to analyze Bainbridge's testimony, to show that no such inference can be drawn therefrom.

In analyzing and discussing Bainbridge's testimony, it has presented the salient features of it in a manner wholly unjustified by the rule of law applicable thereto. Thus, while the rule is elementary, it is perhaps important at this point to call attention to it. The rule is succinctly expressed in *Slocum vs. Erie R. Co.*, 47 Fed., 2nd Series, 216, where the Circuit Court of Appeals stated the following (R. 217):

> "Of course, we must consider this evidence in the light most favorable to the plaintiff, and if, when so viewed, a jury would be justified in finding the defendant negligent, the plaintiff was entitled to have the case submitted to the jury. Both the weight of the evidence and the credibility of the witness were for the jury, unless all the inferences which could be reasonably drawn from the evidence, taken as true, would still be less than enough to justify a plaintiff's verdict. *Baltimore & Ohio R. Co. vs. Groeger*, 266 U. S. 521, 524, 45 S. Ct. 169, 69 L. Ed. 419; *Western & A. R. Co. vs. Hughes*, 278 U. S. 496, 49 S. Ct. 231, 73 L. Ed. 473; *Gardner vs. Michigan Central R. Co.*, 150 U. S. 349, 361, 14 S. Ct. 140, 37 L. Ed. 1107; *Jones vs. East Tenn., etc., R. Co.*, 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478."

Whether or not Bainbridge's testimony was considered in the light most favorable to the plaintiff, can best be seen by examining the

facts as presented by the carrier. It need hardly be emphasized that the most important feature of this case is what Bainbridge testified he saw at the moment just prior to the crash and after the crash.

The carrier, in presenting Bainbridge's testimony points out that Bainbridge saw Chamberlain's draft go in on track 14 at a speed of about three miles an hour, and at the same time saw the nine car draft, running around 14 or 15 miles an hour, going into track 14 (page 5, petitioner's brief). It states "that Chamberlain was still at the same brake as when he started, namely, on the west end of the second car." Then it states the following (p. 5, petitioner's brief):

> "He testified that he paid no more attention to the cars (R. 29-30) until he heard someone shout two or three minutes later (R. 30-1, 51). * * * Bainbridge testified that during the interval noted he heard a 'loud crash' but that he paid no attention to it, and admitted that the crash of cars coming together was nothing unusual" (R. 30, 51-2).

From this it would be inferred that Bainbridge's testimony, taken at its best, would amount to nothing more than that he saw Chamberlain on his draft and the nine car draft a couple of car-lengths to the rear of him, heard a crash, paid no more attention to it until two or three minutes later, when he ran down there

and saw the body on the ground.

If this were the fact, it must be said in all frankness that the respondent did not make out a jury question. Under the circumstances, it becomes necessary to bring to the Court's attention those features of Bainbridge's testimony which support the respondent's version of the happening of the accident.

Bainbridge testified that he saw Chamberlain in on track 14 (R. 28):

> "Q. Could you tell about how far in he was, if you know? A. I imagine a couple of car-lengths.
>
> Q. At that time could you tell how his cut was going, whether it was going fast or slow? * * * A. (p. 29) Yes, he was going slow; possibly three miles an hour.
>
> Q. When you saw it in on 14, the distance you told us, did you see Chamberlain? A. Yes, he was on the car then.
>
> Q. What part of the car was he on? A. The same brake when I saw him first. * * *
>
> The Witness: On the same brake, on the west end.
>
> Q. As you saw Mr. Chamberlain in where you told us on his draft, did you see the band of cars?
>
> * * * * * * *
>
> A. They were just starting in.

Q. Starting in where? A. They were on 14.

* * * * * * *

Q. Could you tell us how that band was going, as to whether it was going fast or slow? A. From the way it looked it was going pretty fast to me, I judge around 14 or 15 miles an hour."

What the witness saw from this point on is most important (R. 29):

"Q. After you saw this band, as you say, just going in on 14, what if anything did you do? A. I didn't pay any more attention to it.

Q. What if anything attracted your attention? A. Well, when I heard them come together, I naturally looked down—

* * * * * * *

A. I saw them drifting in on 14.

Q. After you had seen that band starting in on 14, did you hear anything? A. I heard a loud crash, yes.

* * * * * * *

A. I didn't pay any more attention to it.

Q. After you heard the crash, did you see the cars any more on 14? A. Yes; they were drifting down to 14. * * *

Q. About how long after you say you saw Mr. Chamberlain's draft of cars in on 14—how long after you saw him and saw the band of cars going in on

14, was it before you heard this crash? A. Possibly a couple of seconds. * * *

Q. After you heard the crash, did you see the cars any more on 14? A. Yes, they were drifting in on 14.

Q. After you heard the crash, you say the cars were driving (drifting) in on 14, did you see Mr. Chamberlain any more after that? A. No, I didn't see him.

Q. After the crash, you saw the cars drifting in on 14, were Chamberlain's cars, and the other cars separated or were they together? A. (R. 31) I couldn't tell that. They were all going down together, I couldn't tell whether they were coupled up or not.

Q. But you say they were all going down together? A. Yes, they were all going down together.

Q. As to whether they were locked and coupled together, that you say you don't know? A. I couldn't tell.

Q. After you saw the cars going in there, what if anything did you do? * * * A. I didn't pay any attention to it anymore.''

He then stated that the next thing that attracted his attention was the hollering from track 14, and he ran down there (R. 31).

From this testimony it is indeed apparent that what the witness stated was altogether different than what is represented in the peti-

tioner's brief. While throughout the testimony he used the expression, he didn't pay any more attention, or, he didn't pay any attention to it, it is still important to read his testimony in the light of what he actually said.

He did say that a couple of seconds after he had last seen Chamberlain, he heard a loud crash. He looked down, he saw the cars moving together in one band and Chamberlain was no longer in sight. From this, it is indeed fair to infer that the cars came together and Chamberlain was thrown from his position on the car. What other reasonable inference can be drawn from this testimony? Of course, if parts of the testimony are separated from the remainder, and portions of it are referred to dissociated from its context, an altogether erroneous impression is gathered.

Bearing in mind that the plaintiff is entitled at least to have the testimony given in her behalf considered favorably to her, it is indeed fair to say that Bainbridge's testimony established a collision between the nine car draft and Chamberlain's draft, and thus created a question of fact for a jury.

And when we bear in mind the fact that in an action brought to recover for death, circumstantial evidence usually plays a very important part in establishing the necessary facts, the respondent's case stands on solid ground. See *Western & A. R. Co. vs. Hughes,* 278 U. S. 496, 73 L. ed. 473; *Choctaw Oklahoma & C. R. R. Co. vs. McDade,* 191 U. S. 64, 48 L. ed. 96;

Cincinnati N. C. & T. P. Ry. Co. vs. Jones, 192 Fed. 769 (C. C. A., 6th); *N. Y. Central R. Co. vs. Marcone*, 281 U. S. 345, 74 L. ed. 892; *P. & R. Ry. Co. vs. Effinger*, 299 Fed. 950 (C. C. A., 3rd), *Slocum vs. Erie R. Co., supra.*

The facts as we presented them here are no different than as stated by the Circuit Court of Appeals in its opinion. Regardless of what the Court may decide as to the legal effect to be given to these facts, there should be no controversy as to what the plaintiff actually proved.

The carrier attacks the probability of Bainbridge's testimony, on the ground that he was not in a position where he could see what he said he saw. First, it points out that he was a great distance away from the point of the accident, a distance varying from 800 to 900 feet.

If we examine the map in evidence, we will see that from where Bainbridge was standing to the switch leading into track 14, was approximately 550 feet. When he saw the two drafts before they came together, Chamberlain's was two car-lengths in from the switch. That would add another 80 feet. That would bring the distance to 630 feet. The place where the body was found was about five car-lengths in from the switch, which would make the distance to where Bainbridge stood, about 750 feet.

There was no testimony given by the carrier to the effect that one standing in Bainbridge's

position could not see what he said he saw, especially when we bear in mind that the tracks were on a down grade from the "Hump" to the easterly end of the yard.

The carrier further points out that by reason of the angle of the track, and by reason of the cars, Bainbridge could not have seen whether or not the cars were together and could not have detected their speed. This too, is calling upon the Court to decide an obviously factual question, which does not come within the Court's province.

It also points out that the superstructure of the cars would interfere with Bainbridge's view. The record shows that the cars were gondola cars, and no testimony was presented on behalf of the carrier which would show that a brakeman standing on one of these cars was not visible to one in Bainbridge's position.

All of this is argument which rather belongs to a summation to a jury, than to a court deciding the legal effect to be given to the evidence in a case. As the Circuit Court of Appeals said (R. 190):

> "It does not appear to us impossible, or indeed improbable, that one in his position could tell whether the two strings were together. The intervals between cars in a train are uniform; they may be detected by the straight sides. * * * What Bainbridge saw, coupled with what he had heard, if uncontradict-

> ed, would be enough to support a finding that the nine cars had collided with the deceased's and thrown him off. There is no inherent impossibility in the story."

The carrier in its brief, places great reliance upon numerous decisions of this Court in cases where the question of negligence was involved. It relies upon cases wherein this Court has analyzed the facts and has reached the conclusion that there were such inherent improbabilities in the version relied upon, as to justify a court in directing a verdict for the carrier. Each of these cases stands on its own. If we examine the facts in them, we will discover that the juries were permitted to pass upon questions of fact which were based upon nothing more than surmise or conjecture.

And in the final analysis, that is the very point to be decided here. Was Bainbridge's testimony inherently improbable. Could a court, as a matter of law say that merely because Bainbridge was contradicted by a number of witnesses, he is not, as a matter of law, to be believed. Or could a court, as a matter of law say, that merely because Bainbridge happened to be standing at a distance varying from 650 to 800 feet from the point of the accident, and at an angle estimated by the carrier to be 3° 33', that Bainbridge is not to be believed. As the Circuit Court of Appeals said in its opinion (R. 191):

> "Nevertheless, the question was really

> as to whom to believe, and when that is so, we do not understand that the jury may be displaced. There are of course cases where the story of one side is impossible because of the physical situation, or because it is incredible, by common experience. *Southern Ry. Co. vs. Walters,* 284 U. S. 190, 52 S. Ct. 58, 76 L. Ed.—, was such a case."

Incidentally, the case of *Southern Ry. Co. vs. Walters, supra,* is the case chiefly relied on by the petitioner here. And yet an examination of the facts in that case will readily show that the witnesses relied upon by the plaintiff testified to a set of facts which in itself was inherently improbable. Naturally, the Court was compelled to hold as a matter of law, that no question of fact was created for a jury to pass upon.

As we have already stated, each case decided by this Court stands on its own. It is needless to analyze them here. They are all based on the same principle. Of course, we contend that the principle is not applicable in this instance, as sufficient was shown to create a question of fact for the jury.

For example, if we examine the case of *Western & A. R. Co. vs. Hughes, supra,* we will find that there, too, the carrier had contested the correctness of a judgment, on the ground that the cause of the accident was not proved, but was left to mere speculation. This Court, in its opinion, stated that (R. 498):

> "The evidence introduced by the plaintiff was substantial; and was sufficient, if believed, to sustain a verdict in her favor. There was much conflict in the evidence. The first trial occupied five days. At the second trial 33 witnesses testified. Some of the testimony given by witnesses for the railroad would, if believed, have entitled it to the verdict as a matter of law. Some of the testimony given by witnesses called by the plaintiff does not seem to us persuasive. But the credibility of the witnesses and the weight of the evidence were obviously matters for the jury. The defendant was not entitled to a directed verdict."

The remainder of the cases cited by us in this brief contain facts no more favorable to plaintiffs than those involved here, and still the courts had no difficulty finding a causation between the death and the negligent act causing it.

POINT II.

The Circuit Court of Appeals did not err in examining the record in the case to determine whether or not a question of fact was made out for a jury to pass upon.

The carrier argues that inasmuch as the

Trial Court was in a better position to observe the witnesses as they testified, the Circuit Court of Appeals failed to pay that respect to the ruling of the Trial Court to which it was entitled. The same argument in effect was made on the appeal in the Circuit Court of Appeals. That Court recognized it and answered the question in the following language (R. 191):

> "It was indeed implied in *Patton vs. Texas & Pac. Ry. Co.*, 179 U. S. 658, 660, 21 S. Ct. 275, 45 L. Ed. 361, that the Judge's estimate of the witnesses drawn from his own observation should be weighed in the scale. Yet, if so, it seems impossible to avoid the result that—their credibility may be for him, which the books again and again disclaim. Indeed, unless we are to suppose ourselves in the same position as the Judge when we pass upon his ruling, we must abdicate any review, except in cases where the bare print leaves no doubt. We understand that the question before us is the same as was before him; anything else makes his the final word."

While the carrier seeks to find support for an argument under this point, the logic of Judge Learned Hand is irrefutable. True, the Trial Justice is in a better position to judge of the credibility of witnesses. But the courts have repeatedly stated that the credibility of

witnesses and the weight of the evidence are matters for the jury. At any rate, this question will not stand searching inquiry, for there is nothing to prevent a Trial Judge from directing a verdict upon the ground that a witness, whose demeanor on the stand is observable to the Court, although making out a perfect case on the record, is not to be believed, and under those circumstances, preclude a Circuit Court of Appeals from reviewing the question under this so-called principle.

What is meant apparently, is that where the testimony contains within itself, its inherent improbability, the Trial Court is at liberty to disregard it and direct a verdict for the other side. Again, that raises the same question, and an Appellate Court is indeed empowered to treat with it.

CONCLUSION.

It is respectfully submitted that the judgment of the Circuit Court of Appeals be affirmed.

SOL GELB,
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